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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 803

UNITED STATES, PETITIONER

v.

BRAND INVESTMENT COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above-entitled case on June 5, 1944.

OPINION BELOW

The opinion of the Court of Claims (R. 7–9) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on June 5, 1944 (R. 23). On August 4, 1944, the Government filed a motion for a new trial, which was overruled on October 2, 1944 (R.

23). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

In assessing damages resulting from delay caused by the Government in the performance of a construction contract, may the Court of Claims properly allow

1. A percentage of the contractor's central office overhead, in the absence of any evidence and finding that such overhead was increased as a result of the delay;

2. The rental value of equipment left at the construction site during the period of delay, in the absence of any evidence and finding that the contractor could and would have rented the equipment or was prevented by the delay from using the equipment elsewhere. A subsidiary question is whether the "rental value" of such equipment, if allowable, was properly established here.

STATEMENT

Respondent, a construction contractor with its principal office in Detroit, Michigan, entered into a standard form Government contract with the United States on December 10, 1932, agreeing to construct a post office building in New Castle, Pennsylvania for $209,500 (R. 1, 5, 32).[1] After

[1] Standard Form Contract No. 23, approved by the President on November 19, 1926.

the contract was fully performed by both parties (R. 5, 6, Fdgs. 3, 6), respondent filed suit in the Court of Claims, on February 16, 1939, to recover expenses and losses incurred as a result of a delay of 109 days caused by a stop order issued by the Government (R. 1, 6, Fdgs. 5, 6).

The Court of Claims found that the Government's stop order was not justified and that it constituted a breach of contract; damages totalling $6,215.62 were consequently awarded to the contractor (R. 7, Fdgs. 9, 10). Of this sum, $2,228.40 constituted compensation for actual expenses incurred by reason of the delay, including site overhead, insurance, and expenses of resuming operations (R. 7, Fdg. 9). This award is not here in dispute. In addition, the court below granted $1,071.47 for "main office overhead," and $2,915.75 for "rental value of equipment, discounted because of nonuse." (R. 7, Fdg. 9.) Judge Littleton dissented as to the latter item of damages (R. 9–23).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In allowing the recovery, as part of an award of damages for breach of contract by delay, of a percentage of general office overhead in the absence of any evidence to support or justify the allowance of such percentage or the method employed to calculate such percentage, or to show that general office overhead was actually increased

to the extent of the amount allowed by reason of the delay.

2. In holding, in the absence of any supporting evidence, that a contractor with the Government, delayed by the Government in performance of the contract, is entitled to recover such percentage of his general office overhead during the period of delay which the amount of the Government contract involved bears to the amount of all other contracts then being carried on by the contractor.

3. In finding that an expenditure of $1,071.47 for main office overhead was attributable to the delay.

4. In allowing the recovery of the rental value of idle equipment, arbitrarily estimated, as part of the award of damages for breach of contract by delay, in the absence of evidence that such equipment could have been rented, or that such equipment would have been rented if any opportunity to rent had been available, or that any actual loss was sustained in connection with the idle equipment by reason of the delay.

5. In failing to follow and in overruling *Phoenix Bridge Company* v. *United States,* 85 C. Cls. 603, 631.

6. In finding damage in the amount of $2,915.75 for the rental value of idle equipment, because of non-use of such equipment during the period of delay, without any evidence to support such finding.

7. In entering a judgment for a greater sum than $2,228.40.

REASONS FOR GRANTING THE WRIT

Conceding that the Government committed an actionable breach of the construction contract by delaying performance, we submit that under settled principles the damages which may be recovered are limited to the actual losses shown to have been incurred by reason of the delay.[2] *United States* v. *Wyckoff Pipe & Creosoting Co.*, 271 U. S. 263, 267. As in an action for breach of contract between private parties, "More than compensation for damages actually sustained can never be awarded against the United States." *United States* v. *Smith*, 94 U. S. 214, 218–219; see Williston, *Contracts* (rev. ed. 1937), section 1338.

This fundamental rule was ignored by the court below in awarding damages for two items in the absence of any showing whatever that any actual loss or damage was sustained by respondent in those respects, or if there were loss, that it was due to the delay in performance. Those items were: (1) a portion of the central office over-

[2] The contract here involved was entered into by the United States in the course of a governmental function—the construction of a post office. It is, of course, governed exclusively by federal law. *United States* v. *Allegheny County*, 322 U. S. 174, 181–183; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366; *Irvine* v. *Marshall*, 20 How. 558, 563.

head, and (2) the rental value of respondent's equipment at the construction site during the delay period. Moreover, the court calculated the amounts of the two challenged items solely by a rule of thumb unsupported by evidence or by any pertinent authorities.

(1) *Central Office Overhead.*—At the outset, respondent sought an allowance for central office overhead which consisted of 10 percent of the actual expense at the construction site during the delay period plus $36 per day for such period, the latter figure alone being one-half of respondent's entire central office overhead (R. 26, 35, 36–39, 49–50). Efforts to justify this latter demand on the ground that it would compensate for the time spent by respondent's executives in attempts to have the stop order lifted (R. 29–30, 36–37, 49, 53, 56–58) proved unsuccessful, and the $36 per day item was rejected by the court below (R. 8, 69). The 10 percent item was withdrawn at the hearing (R. 45), and the respondent then offered a method of calculation the first step in which was to multiply the total daily central office overhead by the ratio between construction costs under the post office contract and construction costs on all of respondent's other contracts then pending (R. 46–49).[3] The resulting figure, $9.53 per day, was

[3] Respondent's annual general office overhead for the fiscal year ending March 31, 1934, $26,800.69 (R. 49), was divided by 365 to determine daily general office overhead. The consideration for the construction contract at bar was $209,500; respondent's other contracts at that time totalled $792,400 (R. 36).

asserted to represent the daily general office overhead allocable to the post office project (R. 49), totalling $1,071.47 for the 109 days of delay (R. 7, 69, Ex. 38).

There is not a word in the record, however, to show that the central office overhead was increased in the amount allowed, or indeed in any amount, by the delay which is the basis for recovery. Consequently, there was no evidence to link the delay to any actual loss sustained in regard to central office overhead, and there was nothing to dispel the inference, readily drawn, that such overhead would have been incurred in the self-same amount regardless of the delay. Since evidence of increased central overhead costs, if any, was more readily if not exclusively available to the contractor, there was no warrant for assuming that the existence and extent of the damage was impossible of proof and relying on conjecture as the sole basis for the award.

Respondent sought to justify the method employed, admittedly "a mere calculation" (R. 48), on the ground of "accounting practice" (R. 50), and the court below accepted it on that basis (R. 8). But principles of accounting are no substitute for the showing of actual loss required by settled rules of law. Indeed, accounting authorities themselves recognize the lack of any constant causal relationship between the amount of overhead to be allocated to a project as an ac-

counting matter and the duration or size of the project. Central office overhead includes stable and continuous costs incurred independently of the number or progress of projects in operation (I Taussig, *Principles of Economics* (4th ed. 1939), p. 203; Paton, *Accountants' Handbook* (3d ed. 1943), p. 137), and is, in large part, made up of expenses not actually attributable to any one unit of production but constituting the cost of being in business. Cf. *Lytle, etc., Co.* v. *Somers, etc.,* 276 Pa. 409, 413; Gemmill, *The Economics of American Business* (rev. ed. 1935), p. 431; Marshall, *Principles of Economics* (8th ed. 1938), p. 360. The normal accounting practice of allocating overhead costs among various projects in operation is merely a device for the purpose of dividing a stable and continuing expense among the various units of work and thus computing profit or loss on each unit or project.[4] The allocation need not in any way reflect a cost incurred for the project to which it has been allocated. Myers, *Elements of Modern Economics* (rev. ed. 1941), p. 132; Gemmill, *op. cit. supra;* Paton, *op. cit. supra.* Here, if the value of other jobs in

[4] Respondent employed a job ledger accounting method, posting the cost of each job to the appropriate ledger, but apparently omitting an allocation of central office overhead (R. 60). Respondent's vice president testified that central office overhead was never computed in estimating a construction job but was "taken in on profit and loss" annually, 10 per cent being figured as a "cost of the building" (R. 27, 37).

progress during the period of delay on the instant contract had been cut in half, for all that appears the overhead allocable to this contract under the formula adopted below would have doubled. A formula for computing damages which is dependent upon the amount of unrelated contracts of the plaintiff cannot furnish a reliable substitute for the showing of actual loss required by the decisions of this Court.

The automatic allowance of a "proportionate share" of central office overhead, based upon a rule of thumb and without proof that such overhead was in fact increased by the breach of contract, has become a common practice in the Court of Claims. *Young Engineering Co., Ltd.* v. *United States,* 98 C. Cls. 310; *Severin* v. *United States,* C. Cls. No. 44621, decided June 7, 1943; *Struck Construction Co.* v. *United States,* 96 C. Cls. 186; *Irwin & Leighton* v. *United States,* C. Cls. No. 44915, decided April 3, 1944.[5] It is submitted that this practice of the court below, of which the instant case is typical, assesses a penalty

[5] In the *Young* and the *Severin* cases, a ratio based on direct labor costs was employed; in the *Struck* case, the ratio was derived from collections; in the *Irwin* case, the Court of Claims was unable to decide upon any ratio and made an award of central office overhead "on all the facts and circumstances." While in *Gulf States Creosoting Co.* v. *Loving,* 120 F. (2d) 195, 203–204 (C. C. A. 4), a formula similar to that used by the court below was sanctioned, adequate basis for such use appeared from the fact that the contractor was impeded in connection with other available work by reason of

for breach of contract, is devoid of legal basis, and should be condemned.

(2) *Damages for Equipment at the Construction Site.*—Equally divorced from any showing of actual loss was the award for the equipment kept at the construction site during the delay period. These damages were computed on a daily "rental rate" for each piece of equipment (R. 69), multiplied by the number of days of delay. The only support for this item was testimony that the contractor had held himself in readiness to proceed (R. 27–28) and that it was necessary to have the equipment at the job site when operations were resumed (R. 52). But while this might explain the necessity for leaving the equipment at the site during the period of delay, it does not establish that, absent such necessity, respondent would have had any other use for the equipment. Nothing in the record fills this gap in the proof. Indeed, the only pertinent testimony dispelled any inference of damage since it showed that respondent was not in the renting business and had no interest in the alleged opportunity to rent trucks disclosed by the record (R. 34, 55).

The decision of the court below permitting recovery under these circumstances conflicts in principle with the decisions of the Circuit Courts of Appeals for the Fourth and Sixth Circuits in *Gulf States Creosoting Co.* v. *Loving,* 120 F. (2d)

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the delay. There is no such showing in this case. And compare *Grand Truck Western R. Co.* v. *H. W. Nelson Co.*, 116 F. (2d) 823, 839 (C. C. A. 6), where precise showing of the increased overhead was required.

195, 204–205, and *Grand Trunk Western R. Co.* v. *H. W. Nelson Co.,* 116 F. (2d) 823, 837–839. The vice of the award for this item is highlighted by the fact that the court below predicated it upon the "rental value" of the equipment, not upon any demonstrated loss or damage caused to respondent. Cf. *Palmer* v. *Connecticut Ry. Co.,* 311 U. S. 544, 557. The decisions permitting recovery of damages in these circumstances require the contractor to establish that but for the delay he could and would have rented such equipment,[6] or that he needed the equipment elsewhere for other work and was obliged to hire other equipment for that purpose. *Gulf States Creosoting Co.* v. *Loving,* 120 F. (2d) 195, 204–205 (C. C. A. 4); *Grand Trunk Western R. Co.* v. *H. W. Nelson Co.,* 116 F. (2d) 823, 837–839 (C. C. A. 6); cf. *The Conqueror,* 166 U. S. 110, 135. This rule, as applied in construction contract cases, is clearly stated in *Phoenix Bridge Co.* v. *United States,* 85 C. Cls. 603, 631, which was specifically overruled by the majority below and which required a showing that the delay

[6] The existence of a rental market would raise a question of mitigation of damages, requiring a showing that it was not feasible to realize the rental. *United States* v. *Wyckoff Pipe & Creosoting Co.,* 271 U. S. 263; *United States* v. *Fidelity and Guaranty Co.,* 236 U. S. 512; *Chesapeake & Ohio Ry. Co.* v. *Kelly,* 241 U. S. 485, 489; *Wicker* v. *Hoppock,* 6 Wall. 94, 99.

complained of prevented the removal and use of the equipment on other work.

Disregarding these principles and the absence of the necessary proof, the majority below awarded a substantial amount for the idle equipment, which it characterized as "rental value, discounted for nonuse." Support for the award was sought by the court below in an analogy to the Government's right of eminent domain: the court said that the the Government had "in effect" condemned the machines "to a period of idleness and uselessness" and should pay compensation "comparable to what would be required if it took the machines for use for a temporary period" (R. 8). This analogy cannot apply in a suit for breach of contract, when loss and not value is the true criterion. *Palmer* v. *Connecticut Ry. Co.,* 311 U. S. 544, 557. In such a situation, "principles which govern inquiries as to the conduct of individuals, in respect to their contracts, are equally applicable where the United States are a party" (*Smith* v. *United States,* 94 U. S. 214, 217; *Smoot's Case,* 15 Wall. 36, 47; *Lynch* v. *United States,* 292 U. S. 571, 579, note 6).

The dissenting opinion (R. 9–23) sets forth the correct principles to be applied in determining the award to be made for such an item of alleged damage. It is submitted that the action of the court below in awarding to respondent the "discounted" rental value of equipment at the con-

struction site during the delay period is clearly improper and should be condemned.[7]

(3) *Importance of the question.*—The importance of the review sought herein cannot be overemphasized. The large number of construction contracts entered into by the United States in normal times has been increased to an unprecedented volume by reason of war requirements. Innumerable questions of liability for delay caused by changing government requirements continually arise and will arise in connection with such contracts. Various federal agencies charged with construction duties have indicated serious concern over the consequences of the practice of the court below, as evidenced herein, of awarding damages without regard to a showing of loss and without supporting evidence for the determination of the amount of the award.[8] In the instant

[7] If certiorari is granted, the United States is prepared to question the adequacy of the evidence to sustain the finding as to the rental value of the equipment. Respondent's officers testified generally that the rates sought as damages were lower than prevailing rentals at the time and place in question (R. 29), and that the rates were fair (R. 52), but no testimony was introduced by respondent to support or explain the method employed in reaching the claimed rental rates. A comparison of such rates with charges for similar equipment in *Contractors' Equipment Ownership Expense* by The Associated General Contractors of America, Inc. (1938), shows the charges claimed herein to be far in excess of the amounts there listed.

[8] By letter dated July 13, 1944, the Office of the Judge Advocate General, Army Service Forces, called to the Attorney General's attention the interest of the War Department in the decision of the lower court herein with regard to the equipment award. The letter stated that the effect of

case, the court below awarded $2,228.40 upon evidence to show actual loss caused by the government's breach and the remaining two-thirds of the $6,215.62 award solely by resort to speculation and presumption. The full practical significance of this action can only be realized in terms of the many and recurring instances in which the occasion for similar awards will arise in the court below. It is, therefore, the government's purpose herein to seek a clear ruling by this Court that damages can only be awarded against it for actual loss sustained by reason of its breach and that such award of damages may not include penalty amounts unsupported by such proof and fixed by varying presumptions and rules of thumb.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

JANUARY 1945.

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the ruling would be "* * * to increase substantially the size of judgments which contractors may obtain against the United States for alleged losses in rental values of idle machinery and equipment brought about by temporary cessations of work on War Department projects. Claims of this type frequently involve substantial sums. In the case of *Froemming Bros., Inc., of Texas* v. *United States* (Court of Claims No. 46117), which is awaiting trial, plaintiff's claim for losses in rental value of idle machinery and equipment amount to over $46,000." Similar expressions of interest in the decision herein were received from the Assistant Comptroller General and from the Federal Works Agency.

U. S. GOVERNMENT PRINTING OFFICE: 1945